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IN THE

Supreme Court of the United States

October Term, 1966.

No. 1170

LOCAL 1291, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

and

POCAHONTAS STEAMSHIP COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Supreme Court of the United States.

OCTOBER TERM, 1966.

No.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1291,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

AND

POCAHONTAS STEAMSHIP COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Petitioner, Local 1291, International Longshoremen's Association, respectfully prays that a Writ of Certiorari issue for review of the final judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled matter on December 21, 1966.

OPINIONS BELOW.

The decision and Order of the National Labor Relations Board (NLRB), is printed in the Joint Appendix (3a) for use of the Court below, nine copies of which are filed herewith. The opinion of the United States Court of Appeals for the Third Circuit, reported at 368 F. 2d 107,

is printed as Appendix B hereto (p. 15). The Order of the Court of Appeals denying rehearing is printed as Appendix C hereto (p. 20). The Decree of the Court of Appeals is printed as Appendix D hereto (p. 21).

JURISDICTION.

The Decree of the Court of Appeals was entered on December 21, 1966 (*infra*, p. 21). The jurisdiction of this Court is invoked under 28 U. S. C., 1254(1).

QUESTION PRESENTED.

Where there exists no disagreement as to a work assignment between any two unions, petitioner union being the only one claiming the work at issue, and the second union, drawn into the matter by the employer, has, in writing, specifically disclaimed the work in question, and has stated that it belongs to petitioner union, can there be a "jurisdictional dispute" under Section 8(b)(4)(D) and 10(k) of the National Labor Relations Act?

STATUTES INVOLVED.

The statutory provisions involved are the National Labor Relations Act, Sections 8(b)(4)(i)(ii)(D) and 10(k).

STATEMENT OF THE CASE.

Petitioner has been held guilty of threats and coercion in support of an alleged jurisdictional dispute in violation of Section 8(b)(4)(D) of the National Labor Relations Act. Two separate incidents involving two separate employers [1] are involved, and, since they were related in nature, they were consolidated for hearing and determination. In proceedings under Section 10(k) of the Act, the Board determined in both cases, that petitioner, Local 1291,

1. Pocahontas Steamship Company, owner of "Pocahontas Fuel", and Northern Contracting Co., agent for Marine Transport Lines, owner of the "Marine Electric".

International Longshoremen's Association (ILA) was not entitled to the work, but that National Maritime Union (NMU) was so entitled. This was despite the fact that NMU has specifically declined jurisdiction over the work and has stated categorically that it belongs to ILA (152 NLRB Nos. 69 and 77).

Petitioner, genuinely feeling that the Congress and this Court never intended that a jurisdictional dispute can exist under the Act, in absence of a genuine dispute between two *unions,* did not comply with the determination in order that this constant issue be brought before this Court and specifically clarified once and for all. Upon noncompliance, both employers filed unfair practice charges under Section 8(b)(4)(ii)(D) of the Act. The Board issued complaints, and found against petitioner. The Court of Appeals granted the Board's petition for enforcement.

The work involved in this case is the removal and replacing of hatch covers and supporting beams on coal-carrying vessels, for the loading and unloading of coal. This "hatch-and-beam" work has been historically performed by longshoremen in the Port of Philadelphia, and is specifically assigned in the contract between ILA and Philadelphia Marine Trade Association (PMTA), which bargains for the employers of longshoremen (53a, 117a-118a, 154a, 174a-175a). It is admitted by all of the parties and witnesses in this case that *ILA has exclusively performed this work* on all vessels in Philadelphia for over thirty years (50a, 68a, 90a, 105a, 108a, 113a). However, for economic reasons, the companies unilaterally decided to change the historic practice, take the work away from the longshoremen and have it performed by the crew of the vessels who are represented by NMU.

When the ILA officials were made aware of the both respective incidents of violation of ILA's work rights, they protested to the ship's agents (75a-77a, 115a, 162a-163a, 168a). No threats were made, and no pickets appeared

(75a-77a, 115a, 162a-163a). Nevertheless, the companies filed "jurisdictional dispute" charges.

The companies claim that the NMU agreement assigns the hatch-and-beam work to NMU. But, a reading of the language makes it clear that it *does not assign* the work to NMU, although it does cover the contingencies when the crew has to open or close hatches for any reason (190a-193a, 149a-151a).

Most significantly, NMU has expressly disclaimed the hatch-and-beam work in the Port of Philadelphia and has recognized the jurisdiction of ILA to perform those services and has so informed the Board by letter (120a). Mr. Parise, Port Agent for NMU in Philadelphia (70a), testified that he is familiar with the agreement between NMU and Pocahontas, and with the practice of opening and closing hatches in Philadelphia (70a). He stated that, historically, NMU has recognized that the work of opening and closing hatches belongs to ILA in Philadelphia (70a-71a). In the Pocahontas proceeding, it was pointed out that the NMU contract does talk about hatch work. But, Mr. Parise replied that the contract merely sets forth the rate of compensation if the seamen are ordered to open or close hatches upon special contingencies, that "it doesn't say they must open them" (72a). Mr. Parise said that NMU has never claimed the hatch-and-beam work in the Port of Philadelphia and does not claim it now (72a). Mr. Parise was cross-examined about the fact that NMU crews did open hatches, despite the fact that their agreement does not so obligate them. He agreed that the ships' crews had just recently been doing this. However, he made it clear that this only happens when the crew is ordered to do this work *before* the ship comes into port, that the master may then order them to do so, and the crew will not refuse to obey (73a). Indeed, Mr. Parise said that the master's order would be obeyed—"contract or no contract", but only because of the absolute power of the master's authority in the maritime law (74a).

REASONS FOR GRANTING THE WRIT.

The Decision Below Is in Conflict With the Expressed Intent of Congress and With the Holding of This Court in NLRB v. Radio & Television Broadcast Engineers (CBS), 346 U. S. 573, Because It Found a Jurisdictional Dispute to Exist in Absence of Disagreement as to Work Assignment Between Competing Unions.

The Court below, in clear conflict with the decision of this Court and the legislative history of the Act, holds that a jurisdictional dispute can exist despite the absence of a real disagreement as to work assignment and conflicting claims by two or more labor organizations for the same work. This failure to follow the ruling of this Court is compounded by the fact that the rationale adopted by the Court below opens the way for employers to destroy the historic and contractual rights of one union by merely unilaterally assigning the work to another union and then crying "jurisdictional dispute!" when the former insists upon its rights. The Act was specifically intended to protect the innocent employer *who is genuinely caught between two rival unions,* and *not* to permit the employer to urge upon the Board his *own* dispute with one claiming union. If the decision below is permitted to stand, no labor union will be able to rely upon its collective bargaining agreement nor its customary rights.

The legislative history of the Act and the express statement of this Court specify that a genuine dispute between unions which make conflicting claims for a single work assignment is essential to the existence of a jurisdictional dispute under Sections 8(b)(4)(D) and 10(k) of the Act. In explaining his bill embodying these sections to the Senate, Senator Taft defined "jurisdictional dispute" very clearly:

> "The fourth type of unfair labor practice is the ordinary jurisdictional strike, in which *two unions* com-

pete for work on a particular job."[2] (Emphasis supplied.)

The report of the Committee of Conference on the Act stated, concerning Section 10(k):

> "* * * This section would empower and direct the Board to hear and determine *disputes between unions* giving rise to unfair labor practices under section 8(b)(4)(D) (jurisdictional strikes) . . ."[3]

In *NLRB v. Radio and Television Broadcast Engineers (CBS)*, 364 U. S. 573, 5 L. Ed. 2d 302 (1961), this Court confirmed this definition of "jurisdictional dispute". In discussing Section 10(k), this Court stated that it is ". . . the Board's responsibility and duty to prescribe which of two or more employee groups claiming the right to perform certain work tasks is right and then specifically to award such tasks in accordance with its decisions" (364 U. S. at 587). In absence of two or more groups claiming the right, the issue itself is not even raised. That was the situation in the instant case, so that there never was a legal basis for the charge.

Until the instant case, the Board had consistently so held. In *Local 1905, Linoleum and Tile Layers Union*, 143 NLRB No. 39, 53 LRRM 1324 (1963), a general contractor assigned certain work to the carpenters' union, but the painters claimed it. The carpenters, in accordance with an agreement with the painters, never claimed the work. Despite the contractor's desires, the Board said:

> "The Board has noted on previous occasions that implicit in the thrust of the Supreme Court's decision

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2. Cong. Record, Senate, April 23, 1947, p. 3954, Leg. Hist. of Labor Management Relations Act of 1947, Vol. II, p. 1012 (U. S. Govt. Ptg. Off. 1948).

3. House Report No. 510, June 3, 1947, U. S. Code Cong. & Admin. News, 1947, p. 1163.

in the CBS case is the proposition that Sections 8(b)(4)(D) and 10(k) were limited to situations involving competing claims between *rival* groups of employees, and were not designed to require the Board to arbitrate a dispute between a union and an employer when no such competing claims are involved." (53 LRRM at 1326) (Emphasis in original.)

Similarly, *Sheet Metal Workers Union*, 136 NLRB 1402, 50 LRRM 1017 (1962); *Safeway Stores, Inc.*, 134 NLRB 1320; *Teamsters Local 70—Hills Transportation Co.*, 136 NLRB 1086.

In further conformity with this application of the Act, in *Pennello v. Local 59, Sheet Metal Workers*, 195 F. Supp. 458 (D. Del. 1961), the Court said (464):

> "If no group resists or opposes another's claims to particular work, there is no 'dispute' to be voluntarily adjusted, unless it be the very active dispute between the group claiming the work and the resisting employer."

However, the Court emphasized, Section 10(k) does not authorize Board determination of disputes between union and employer. The court emphasized the purpose of the statutory scheme to protect innocent employers:

> "Obviously, § 10(k) is not meaningful unless designed to come to the employer's rescue only when he is caught between competing forces and is 'between the devil and the deep blue.'" (467)
>
> * * *
>
> "Indeed, the legislative history is clearly contrary to petitioner's contention and indicates that the Board is to determine whom the employer must hire only when the employer himself is trapped between competing forces." (468)
>
> * * *

> *"If there is no dispute between rival groups of employees, there is nothing for the Board to 'determine' under § 10(k).* Absent such a dispute, the voluntary adjustment provisions are rendered meaningless. Moreover, for all that appears in this record, some of the unionized workers who were doing the sheet metal work have cooperated with respondent in refusing to cross the picket line, and their union does not even care to be a party to the § 10(k) proceeding.
>
> "The only dispute is between DuPont and Local 59. Picketing in such a situation is not proscribed by § 8(b)(4)(D) because it does not involve a dispute between rival groups of employees over particular work." (471) (Emphasis supplied.)

The essential dispute between two rival unions does not exist here, only the dispute between employer and one union exists. Indeed, NMU specifically disclaims the work and states categorically that it belongs to ILA. Yet the Court below strives to fashion such a dispute and inter-union conflict by the expedient of wholly ignoring the specific assignment of this work in the ILA agreement, and interpreting the agreement between the ship operators and NMU as assigning the work to NMU, and, then, stating, without any factual or legal jurisdiction, that "there was no refusal of NMU seamen to do this work and no denial by NMU that its contract . . . obligated the deck crew to do hatch-and-beam work as required in loading and unloading cargo" (368 F. 2d at 110). With this basis, wholly unfounded in the record, the Court below then concluded that since the NMU seamen are thus "entitled to" the work, and since they do not agree to "forego the right of payment" for that work, they cannot be deemed to have disclaimed the right to the work (368 F. 2d at 110).

This conclusion by the Court is wholly unfounded in fact as well as in law and reason. Despite the Court's state-

ment, *the record is clear and uncontradicted that NMU did and does deny that its contract obligated its seamen to do the hatch-and-beam work.*

Further, under maritime discipline, the seamen could not with impunity "refuse" to do this work if ordered to perform it. The specific disclaimer by NMU of this work is in this record in writing. Further, in fact, NMU specifically recognizes the sole jurisdiction of ILA to perform this work in the Port of Philadelphia (70a, 71a, 120a), and has so recognized it for many years (71a) and has never claimed this work in the Port of Philadelphia (72a). There is, therefore, no doubt whatever that, in the Port of Philadelphia, NMU accepts our port custom that hatch-and-beam work belongs to the longshoremen.

When it was observed that, although NMU disclaims this work, its contract does refer to opening and closing hatches, Mr. Parise, NMU port agent, denied that the contract obligates the seamen to perform this work, pointing out:

> "The contract says that if our men open and close the hatch it means they will be compensated for it after certain hours. It doesn't say that they must open them. It says if they are required to do it, then they shall be paid for it." (72a)

This is a far cry from performance of work *as a contractual obligation.* It refers, obviously, to those *contingencies and duties under maritime law* that may and do arise aboard ship, and which are subject to the complete discretion of the Master, even in contravention of contract, under the laws of absolute authority. Thus, as testified:

> "They open them before they come in because the master has ordered them to; and as long as the master has ordered them to open them they will. They will not refuse any orders." (73a)

This work is done if ordered, because of "the maritime discipline"—"that's maritime law—you have to obey the master . . . contract or no contract" (74a).

Proof positive of the fact that the NMU contract does *not* require that seamen perform hatch-and-beam work becomes obvious in a comparison with the ILA contract. The NMU Agreement with the Collier Companies[4] refers to hatches in three places. Article III, Section 5, provides for overtime rates, "if required". Article IV, Section 2, specifies that a "sufficient number of men" be used in opening and closing hatches "to insure safety." Article III, Section 6(e)(8) provides for overtime for this work at night, weekends and holidays. *At no place in the contract is there an assignment of the work*—it covers only the contingency that the work might have to be performed by the crew. Indeed, a contract involving vessels must be broad enough to deal with the extraordinary events and duties that may arise aboard ship, although absent and not required under usual circumstances. This is a characteristic of maritime employment which is not applicable in any other private enterprise.

On the other hand, the ILA contract[5] makes a clear and unambiguous assignment of hatch work to longshoremen. It states, in its Preamble, that work which has been historically and is currently performed by ILA employees must continue to be performed by them. Further, Section 1 provides that where longshoremen enjoy work jurisdiction concurrently with persons represented by other ILA locals in the Port of Philadelphia, "such work shall remain unchanged". The agreement continues: "These include . . . (f) Opening and covering up hatches. . . ."

The ILA agreement makes a specific reservation of jurisdiction over hatch-and-beam work, and specifically assigns it to ILA. The NMU contract makes no reservation or assignment whatever, but only provides for a wage

4. Joint Appendix below, 190a-193a.
5. Joint Appendix below, 117a-119a, 189a.

rate in the event that the contingency should arise whereunder the Master should order the crew to open or close hatches, which order the men must obey, "contract or no contract."

Thus, the three bases upon which the Court below attempts to evade this Court's clear mandate, must fall, as must the rationale erected thereon. The Congress and this Court have made it clear that Sections 8(b)(4)(D) and 10(k) can be invoked *only* to protect an employer who was the innocent victim caught between two or more unions, each claiming the work. It is not enough that the dispute is between the employer and only one union, or that the employer for economic reasons desires to assign the work to a union other than the one claiming the work. The Court below has tortuously attempted to rationalize the existence of a dispute by substituting an employer-union disagreement for the essential union-union dispute, but this is, as a matter of law, insufficient to sustain its position. The statement by the Court below that ILA must be deprived of this work, because NMU seamen have not given up a portion of their own pay in return for not opening hatches, wholly ignores that seamen are paid a monthly stipend, which includes compensation only *for being available aboard ship for whatever contingency may arise.* This pay cannot possibly be broken up and allocated to each chore of the seaman. Further, as stated, the seamen may be called upon by the Master to open or close hatches at sea or in foreign ports, just as they may be called upon for the same monthly stipend to fight fire, lower lifeboats, and save lives. To challenge them to refund wages because these contingencies do not arise evidences a complete misunderstanding of the problem. To say that the seamen make claim to work because they do not forego a part of their wages is further tortured reasoning, practically impossible to satisfy. And, to deprive longshoremen of this work, which makes up a large part of their livelihood because of its possible incidence in the work of a seaman is a

sheer destruction of the longshoremen's historic and contract rights. Yet, this is the effect of the decision below.

If that decision is permitted to stand, a large exception will have been whittled out of this Court's CBS decision. Henceforth, an employer with an economic basis for a change of established method of operation (as, perhaps, unilaterally to take advantage of automation) will be able to broaden his dispute with the one union into a "jurisdictional dispute" by the quick expedient of assigning the work to another union whose members are in its or its subcontractor's employ, and then sit back and watch the alchemy take place.

CONCLUSION.

In reaching its conclusion, the Court below took note of the economic basis for the ship's assignment of the work of the seamen—the saving of $900.00. But, the economic position of the longshoremen who are thereby deprived of their very livelihood must also be considered. If the latter factor does not heavily outweigh the ship's economic interest, it does most assuredly neutralize it. Creeping automation should not be cited with a shrug as an excuse to promote the employer's economic interest to the detriment of that of the employees. It is surely not a justification for twisting Section 8(b)(4)(D) into a weapon for the deprivation of a union's historic and contract rights and jurisdiction. This was not the intent of this Court in announcing the CBS decision, which delineated the Board's powers.

It is respectfully prayed that a writ of certiorari be granted and that the decision below be reversed.

Respectfully submitted,

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Counsel for Petitioner.

APPENDIX A.

National Labor Relations Act (29 USCA).

* * *

§ 158. Unfair Labor Practices.

* * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * *

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

* * *

§ 160. Prevention of Unfair Labor Practices—Powers of Board Generally.

* * * * *

Hearings on jurisdictional strikes.

(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

* * *

APPENDIX B.

(368 F. 2d 107)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 15835.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

AND

POCAHONTAS STEAMSHIP COMPANY,
Intervenor,

v.

LOCAL 1291, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
Respondent.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

Argued September 30, 1966.

Before: HASTIE, SMITH and SEITZ, *Circuit Judges.*

Opinion of the Court.

(Filed October 27, 1966)

By HASTIE, *Circuit Judge.*

The cease and desist order which we are asked to enforce in this unfair labor practice proceeding is based upon a finding by the National Labor Relations Board that the

respondent, Local 1291, International Longshoremen's Association, has used coercive means in violation of section 8(b)(4) of the National Labor Relations Act, as amended, 29 U. S. C. § 158(b)(4), to compel ship operators, Pocahontas Steamship Co. and Marine Transport Lines, Inc., or the contractors employed by them to load their vessels, to assign the work of opening and closing hatches before and after loading cargoes of coal at the port of Philadelphia to longshoremen represented by the respondent union rather than to seamen, members of the ships' crews. The seamen involved are represented by National Maritime Union (hereinafter designated "NMU") and customarily Pocahontas and Marine Transport have assigned the tasks in question to them.

At an appropriate stage of this controversy the Board conducted a hearing under section 10(k) of the Act and determined that the seamen, rather than the longshoremen, were entitled to this work. However, the respondent refused to be bound by that determination and this unfair labor practice proceeding was carried to final decision against the respondent. We are asked to enforce that decision.

The central question now is whether this was a proper case for a section 10(k) determination. Section 10(k) authorizes the Board "to hear and determine the dispute out of which . . . [an alleged section 8(b)(4)(D)] unfair labor practice shall have arisen . . . ." Section 8(b)(4)(D) deals with coercive conduct by a labor organization for the purpose of "forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another . . . ." Thus, on its face, section 10(k) contemplates and is limited to situations in which conflicting claims of two labor organizations with reference to particular work are imposing undue hardship upon the employer. Absent such conflicting union claims there can be no section 10(k) "dispute" for the Board to determine. *Local 1905, Carpet Linoleum and Soft Tile*

Layers, 1963, 143 NLRB 251; *Sheet Metal Workers International Assn., Local 272*, 1962, 136 NLRB 1402. The respondent's principal contention is that NMU does not take a position in this case that conflicts with the longshoremen's insistence that they be assigned the hatch and beam work.

While the details of the dispute involving Pocahontas ships are somewhat different from those of the Marine Transport controversy, we find no differences that are decisive. Accordingly, we shall state the facts of the Pocahontas dispute only.

The record shows that at all relevant times labor contracts were in force between the shipowner and NMU under which it was agreed that specified salaries would be paid to the unlicensed seamen assigned to the deck department of Pocahontas crews and that in consideration thereof these seamen would be responsible for various tasks including "hatch and beam" work as required.[1] This work involved the removal and subsequent replacement of hatch covers and was accomplished on the ships in question by electrically powered machinery. There was uncontradicted evidence that a single man, operating electrical controls, could remove the hatch covers or replace them in less than thirty minutes.

For many years it has been the custom and practice at the port of Philadelphia that stevedoring companies, employed by shipowners to load and unload ships, utilize the services of longshoremen, members of the respondent union, for the opening and closing of cargo hatches. Customarily, a specialized gang of six men and a foreman is assigned to a ship for this service. The Philadelphia Marine Trade Association, the bargaining organization for the Philadelphia stevedoring companies, recognizes this work as the responsibility and prerogative of the longshore-

1. The Board found this to be the correct construction of the NMU contract and we agree. Although the respondent disputes this reading of the contract, we find it very persuasive that NMU and the Pocahontas crewmen have not denied this contract obligation and the crewmen have performed hatch and beam work without protest.

men. However, Pocahontas was unwilling to hire longshoremen for this work which members of its crews customarily performed as provided under the NMU labor contract.

In these circumstances, within a four month period, members of the respondent union picketed three Pocahontas ships and prevented each of them from loading until the respondent's hatch and beam gang was hired. Apparently, this gang closed the hatches which the crews had opened and was paid $900 for this unwanted service. Pocahontas then filed the unfair labor practice charge which led to the present proceeding.

While this case was pending NMU advised the Board's Regional Director that it "does not make claim to the work of opening and closing hatches involved in the case". However, there was no refusal of NMU seamen to do this work and no denial by NMU that its contract, which regulated the employment of seamen, obligated the deck crew to do hatch and beam work as required in loading and unloading cargo. The respondent argues that the "disclaimer" by NMU prevents this case from presenting a jurisdictional dispute between the two unions within the meaning of section 10(k) of the Act.

From a workman's point of view, the valuable part of a right to a particular job is the right to be paid for it. Thus, a jurisdictional dispute between two groups of employees as to which is entitled to certain work is in essence a dispute as to which shall receive compensation for that work. The opportunity sought to perform labor is significant only as a means of obtaining compensation. It follows that if workmen, who are entitled to a job under the terms of a labor contract, agree to forego the obligation of working but not the concomitant right to payment, they have not disclaimed any significant right. When, as in this case, one group insists that work, for which another group has contracted and is being paid, be assigned it, the fact that both groups are claiming pay for the same work

suffices to create a jurisdictional dispute, and it is irrelevant that either group, or both, may manifest a willingness to take the pay and forego the work. See *International Brotherhood of Carpenters v. C. J. Montag & Sons, Inc.*, 9th Cir. 1964, 335 F. 2d 216, 221. Contrast *Penello v. Local 59, Sheet Metal Workers International Assn.*, D. Del. 1961, 195 F. Supp. 458, where the union to which an employer proposed to assign work had no contractual right to the work and was not claiming work or attendant pay.

Finally, it is argued that the determination awarding the work in controversy to seamen rather than longshoremen is not supportable on the merits. However, we think the Board could properly give substantial weight to the fact that this work was covered by the seamen's contract and was customarily performed by seamen on Pocahontas and Marine Transport ships. The Board also found the seamen competent to do this work. Certainly, the continuation of this assignment would be economical. In this connection, the Board cited "uncontroverted evidence that the cost of hiring an ILA 'hatch and beam' gang was approximately $900", an expense additional to the pay of the seamen who had contracted to do this work. True, there was the countervailing consideration that in connection with the loading and unloading of cargo it was the custom of the port of Philadelphia to employ longshoremen for hatch and beam work. But we cannot say that, weighing these competing considerations, the Board reached a decision that was arbitrary or without rational justification. *Cf. NLRB v. Local 825, International Union of Operating Engineers*, 3d Cir. 1964, 326 F. 2d 213.

Of course, as the Board stated in determining this dispute, "the present award is limited to the particular controversy which gave rise to this proceeding". This decision in no way controls any other dispute over hatch and beam work in which relevant circumstances can be shown to be different.

The order of the Board will be enforced.

APPENDIX C.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 15,835.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

AND

POCAHONTAS STEAMSHIP COMPANY,
Intervenor,

v.

LOCAL 1291, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
Respondent.

Sur Petition for Rehearing.

Present: STALEY, *Chief Judge,* and MCLAUGHLIN, KALODNER, HASTIE, SMITH, FREEDMAN and SEITZ, *Circuit Judges.*

The petition for rehearing filed by LOCAL 1291, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, *Respondent,* in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,

/s/ WILLIAM H. HASTIE,
Circuit Judge.

Dated: November 28, 1966.

APPENDIX D.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 15,835.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

AND

POCAHONTAS STEAMSHIP COMPANY,
Intervenor,

v.

LOCAL 1291, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
Respondent.

Decree.

Before: HASTIE, SMITH, and SEITZ, *Circuit Judges.*

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for enforcement of a certain order issued by it against Respondent on September 29, 1965. The Court heard argument of respective counsel on September 30, 1966, and has considered the briefs and transcript of record filed in this cause. On October 27, 1966, the Court, being fully advised in the premises, handed down its decision granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Third Circuit that the said order of the National Labor

Relations Board in said proceeding be enforced, and that Respondent, Local 1291, International Longshoremen's Association, AFL-CIO, its officers, agents and representatives abide by and perform the directions of the Board in said order contained.

By THE COURT,

WILLIAM H. HASTIE,
Circuit Judge.

DATED: December 21, 1966.